STATE OF MICHIGAN

COURT OF APPEALS

JUAN D. TOWNS,

Plaintiff-Appellant,

v

CITY OF DETROIT and OLD REDFORD BOWL d/b/a REDFORD BOWL & SPORTS BAR,

Defendants-Appellees.

UNPUBLISHED
August 26, 2003

No. 238930
Wayne Circuit Court
LC No. 00-035146-NO

Before: Hoekstra, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

In this negligence and premises liability action, plaintiff appeals as of right the circuit court's grant of summary disposition in favor of defendant Old Redford Bowl.[1] This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

At approximately 9:30 p.m. on August 9, 2000, plaintiff and a friend went to defendant establishment to play pool. When leaving the establishment approximately one hour later, plaintiff tripped on broken asphalt at the edge of a sunken manhole cover in the parking lot and fractured his right tibia.

On appeal, plaintiff argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant establishment on the basis of the open and obvious danger doctrine. Specifically, plaintiff argues that the hazardous condition was "hidden or latent" rather than open and obvious in character at the time plaintiff sustained his injury. We disagree.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue

[1] Plaintiff does not appeal the trial court's grant of summary disposition in favor of defendant City of Detroit.

regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

In general, a possessor of land owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-612; 537 NW2d 185 (1995). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the possessor of land has a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517. The critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly special aspects of the open and obvious condition that create an unreasonable risk of harm. *Id.* If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Id.* at 517-519.

Here, plaintiff asserts that the condition, i.e., the sunken manhole cover surrounded by broken asphalt, was hidden or latent under the conditions of darkness and poor artificial lighting. The undisputed facts show that plaintiff entered the establishment through the same door he used to leave the establishment one hour later. Defendant testified that when he walked out of the establishment, he was talking to his friend and looking in the direction of the car. The fact that plaintiff did not see the depression is irrelevant. *Novotney, supra* at 475. However, it is reasonable to conclude that plaintiff would not have been injured had he been watching the area in which he was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff did not come forward with sufficient evidence to create an issue of fact as to whether an average person with ordinary intelligence could not have discovered the condition upon casual inspection. *Novotney, supra* at 474-475. Further, although it was dark outside at the time, there is nothing unusual about darkness befalling at night, and an everyday occurrence such as potholes in parking lots in Michigan ordinarily should be observed by a reasonably prudent person. *Lugo, supra* at 522-523. Moreover, it cannot be expected that a typical person tripping on a pothole, in this case a sunken manhole cover surrounded by broken asphalt, even at night, and falling to the ground would suffer severe injury. *Lugo, supra* at 520-522. The trial court properly granted summary disposition in favor of defendant establishment.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Brian K. Zahra